

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JAMES P. McGRANE and U.S. POSTAL SERVICE,  
POST OFFICE, New York, NY

*Docket No. 98-1364; Submitted on the Record;  
Issued April 6, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective July 29, 1997, on the grounds that he had no disability due to his November 7, 1988 employment injury after that date.

On November 7, 1998 appellant, then a 43-year-old mailhandler, sustained an employment-related distal radio-ulnar joint disassociation of his left wrist; the Office later accepted that appellant sustained a right shoulder strain. Appellant did not stop work until seven months after his injury and later began working in a light-duty position; he stopped work on February 7, 1991.<sup>1</sup> Appellant was terminated from the employing establishment effective November 29, 1991 due to absences from his scheduled duty.

By decision dated June 10, 1996, the Office determined that appellant was entitled to wage-loss compensation through July 15, 1991 on the grounds that there was no medical evidence supporting employment-related disability after that date and limited-duty work was available at the employing establishment to accommodate appellant's condition.<sup>2</sup> By decision dated and finalized March 11, 1997, an Office hearing representative set aside the Office's June 10, 1996 decision. The Office hearing representative indicated that the Office did not adequately advise appellant regarding the medical evidence he needed to submit in support of his claim and that the Office had not established whether the employing establishment formally offered appellant a light-duty position in writing.

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<sup>1</sup> Appellant filed a claim alleging that he had sustained a recurrence of disability on February 7, 1991 due to his employment injury.

<sup>2</sup> By accepting appellant's claim for compensation through July 14, 1991, the Office, in effect, terminated appellant's compensation effective July 15, 1991. Appellant received compensation for wage loss for the period February 7 to July 14, 1991.

In May 1997 the Office requested that the employing establishment provide information regarding whether it made a formal job offer to appellant.<sup>3</sup> The employing establishment indicated that no job offer had been made to appellant prior to his termination. In July 1997 the Office referred appellant to Dr. Bruce Silverberg, a Board-certified orthopedic surgeon, for examination and a second opinion regarding whether he had continuing employment-related disability. By decision dated February 27, 1998, the Office terminated appellant's compensation effective July 29, 1997 on the grounds that he had no disability due to his November 7, 1988 employment injury after that date. The Office based its termination on the opinion of Dr. Silverberg.<sup>4</sup>

The Board finds that the Office met its burden of proof to terminate appellant's compensation effective July 29, 1997 on the grounds that he had no disability due to his November 7, 1988 employment injury after that date.

Under the Federal Employees' Compensation Act,<sup>5</sup> once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.<sup>6</sup> The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>7</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>8</sup>

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Silverberg, the Board-certified orthopedic surgeon, who served as an Office referral physician. The February 19, 1998 report of Dr. Silverberg establishes that appellant had no disability due to his November 7, 1988 employment injury after July 29, 1997.

In his report, Dr. Silverberg detailed appellant's factual and medical history and reported the findings of the examination he performed on July 28, 1997. Dr. Silverberg noted that past and present findings of diagnostic testing did not show degenerative change or distal radial-ulnar, radial-carpal, or intracarpal joint instability. He indicated that distal radial-ulnar joint stress did not demonstrate remarkable laxity as had previously been reported. Dr. Silverberg noted that a full range of left wrist motion was observed without grinding, reported discomfort or instability. He indicated that an instability was clinically suggested between the lunate and triquetrum upon radial and ulnar deviation, but that this was not accompanied by pain or

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<sup>3</sup> The Office also requested that appellant submit additional factual and medical evidence.

<sup>4</sup> The Office noted that the employing establishment indicated it had not formally offered appellant a light-duty position in writing. By terminating appellant's wage-loss compensation effective July 29, 1997, the Office, in effect, made a determination that appellant was entitled to wage-loss compensation through July 28, 1997.

<sup>5</sup> 5 U.S.C. §§ 8101-8193.

<sup>6</sup> *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

<sup>7</sup> *Id.*

<sup>8</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

discomfort. Dr. Silverberg stated that appellant had full range of motion bilaterally of his shoulders, elbows, forearms, wrists and hands without ligamentous instability, tendinous restriction, or joint articular problems. He indicated that recent examination demonstrated symmetrical muscle contour, strength and performance, which showed the absence of left upper limb exclusion with daily tasks and activities.

Dr. Silverberg determined that appellant could return to unrestricted working activities as a mailhandler on a full-time basis and stated:

“[A]ppellant’s clinical examination has failed to demonstrate evidence of progressing wrist joint instability and related functional impact. The absence of radiologic progression in a 10 year interval demonstrates obviously limited consequence and sequelae from the reported injury. Present examination has failed to document sufficient objective physical findings, which would preclude further working activities as reviewed by prior job descriptions....

“Finally, how much significance can be directed to a ‘record recognizing’ minor wrist strain injury more than 10 years following the date of occurrence? [Appellant] has clearly not excluded his left arm from activities of daily living. Based upon the present evaluation and findings, I am unable to appreciate a singularly significant or specific intracarpal difficulty which, over the recent decade, has represented a source of progressing instability, difficulty, or developing degenerative change.”<sup>9</sup>

The Board has carefully reviewed the opinion of Dr. Silverberg and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Silverberg’s opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Moreover, Dr. Silverberg provided a proper analysis of the factual and medical history and the findings on examination, including the results of diagnostic testing and reached conclusions regarding appellant’s condition, which comported with this analysis.<sup>10</sup> Dr. Silverberg provided medical rationale for his opinion by explaining that the findings upon examination and diagnostic testing were extremely limited and did not show that appellant had any employment-related disability. He noted that appellant’s employment injury was of such a

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<sup>9</sup> Dr. Silverberg indicated that a diagnostic evaluation should be performed if appellant reported difficulties in the future. He further noted that appellant’s statements and actions suggested the presence of “emotional overlay, overstatement, exaggeration, and likely issues of secondary gain” in connection with his condition.

<sup>10</sup> See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

nature that it would have resolved itself before July 1997. Dr. Silverberg also suggested that appellant's current problems could be explained by "issues of secondary gain."<sup>11</sup>

Therefore, the Office met its burden of proof to terminate appellant's compensation effective July 29, 1997 on the grounds that he had no disability due to his November 7, 1988 employment injury after that date.

The decision of the Office of Workers' Compensation Programs dated February 27, 1998 is affirmed.<sup>12</sup>

Dated, Washington, D.C.  
April 6, 2000

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

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<sup>11</sup> Although appellant was provided an opportunity to submit further medical evidence, the record does not contain any other medical evidence from around the time of the termination of appellant's compensation effective July 29, 1997. From a review of the record, it does not appear that appellant sought medical treatment for his condition after 1991.

<sup>12</sup> As noted above, appellant would be entitled to wage-loss compensation through July 28, 1997.